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No. 03-891

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAVID A. GILL, CHAPTER 7 TRUSTEE,

Petitioner,

v.

STEVEN H. STERN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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INTRODUCTION

By his Brief in Opposition ("Brief"), Respondent Steven H. Stern ("Stern") urges this Court to deny the Petition for Writ of Certiorari ("Petition"), asserting that there is no circuit split and there is no question of "pervasive national importance," Brief at page 1, for this Court to resolve. Stern argues that at most what is involved is the interpretation of different state exemption laws, Brief at pages 1-2.

Petitioner, David A. Gill, Chapter 7 Trustee ("Trustee") urges this Court to grant the Petition. The split among the circuits has been made apparent by the Ninth Circuit Court of Appeals' Amended Opinion below. The fact that different state exemption laws are involved is not germane to the split, and the question presented in this case as to the "intersection of fraudulent transfer law and exemption planning," Brief at page 1, Petition at page i, is the height of importance and deals with the interpretation of the Bankruptcy Code.[1]

ARGUMENT

The Petition is premised upon the split among the circuits created by the Ninth Circuit's Amended Opinion below as contrasted with the decision by the Eighth Circuit Court of Appeals in *In re Sholdan*, 217 F.3d 1006 (8th Cir. 2000) and by the Fourth Circuit Court of Appeals

[1] The Trustee will separately file a Brief in Opposition to the "Conditional Cross-Petition for Writ of Certiorari" (03-1055) filed concurrently by Stern with his Brief in Opposition.

in *Tavenner v. Smoot*, 257 F.3d 401 (4th Cir. 2001), cert. denied, 534 U.S. 1116 (2002). The facts in this case are set forth in the Petition and although Stern characterizes the Trustee's statement of facts as " . . . a colorful – and one-sided – history . . . " designed to " . . . curry visceral sentiment . . . ," Brief at pages 2 to 3, Stern does not point to any particular fact or facts that the Trustee has misstated. Stern's Brief thus turns on his assertions that there is no split among the circuits or nothing of importance for this Court to address.

It is in fact clear that the majority opinion by the Ninth Circuit below creates an ironclad rule that forecloses an analysis of extrinsic facts in determining when exemption planning has passed over into fraudulent transfer. In contrast to the Ninth Circuit, *Sholdan* and *Tavenner* require a factual analysis and hold that a sufficient factual showing can be made that a transfer has gone beyond exemption planning into a fraudulent transfer. What the Ninth Circuit has decided cannot be tried, the Eighth and Fourth Circuits have decided must be tried. An analysis of the Eighth and Fourth Circuit cases shows the difference.

In the case of *In re Sholdan*, 217 F.3d 1006 (8th Cir. 2000), the Eighth Circuit was faced with an appeal from the affirmance of a bankruptcy court order that sustained the bankruptcy Trustee's objection to the debtor's homestead exemption. The debtor, when 90 years of age and afflicted with various medical problems and living in an assisted care facility, had liquidated almost all of his non-exempt property and converted it into exempt property in the form of a house. Shortly thereafter, the debtor filed bankruptcy and then passed away. *In re Sholdan*, *supra*, at page 1008. The matter had previously been before the

Eighth Circuit, when the Circuit ruled that the facts did not support the Bankruptcy Court's finding that the debtor had acted with the "intent to hinder or delay" but remanded for consideration of whether the facts supported a finding that the debtor had acted with the "intent to defraud." *In re Sholdan*, *supra*, at page 1008. The Bankruptcy Court on remand found that such intent underlay the conversion from non-exempt property to exempt property, and was affirmed by the District Court and then by the Eighth Circuit, *Sholdan*, *supra*, at page 1008-1009. Nothing in the *Sholdan* court's discussion of the Minnesota version of the Uniform Fraudulent Transfer Act is of consequence to the decision. The Eighth Circuit focused on bankruptcy issues related to transfer of assets. The precise provisions of the state exemption statutes do not come into play. Rather, the decision turns on weighing the facts, evaluating the circumstantial evidence adduced to determine the question of transferor intent. The Bankruptcy Court noted a "radical departure" from the debtor's prior lifestyle in the transfers under examination. Based on the record before it, the Eighth Circuit affirmed, stating " . . . we find the bankruptcy court correctly concluded there was ample evidence extrinsic to the mere conversion of assets that shows fraudulent intent on the part of the debtor. It is one thing to convert non-exempt assets into exempt property for the express purpose of holding it as a homestead and thereby putting the property beyond the reach of creditors. [citation]. However, it is quite another thing to acquire title to a house for no other reason than to defraud creditors." *Sholdan*, *supra*, at 1010-1011.

The facts here demonstrate a no less radical departure in Stern's lifestyle. In the context of making the IRA Transfer, Stern also obtained a divorce and made other

surrounding transfers. This is surely no less a radical change than the *Sholdan* change. But, in contrast to *Sholdan*, the Ninth Circuit has ruled that on these facts, no trial is required.

Similarly, in *Tavenner v. Smoot*, 257 F.3d 401 (4th Cir. 2001), cert. denied, 534 U.S. 1116 (2002), the issue before the Fourth Circuit was " . . . whether a bankruptcy trustee can avoid a transfer of potentially exempt property on the ground that a debtor transferred the property with the intent to hinder, delay, or defraud his creditors under 11 U.S.C. § 548." *Tavenner*, *supra*, at page 404. That is the precise issue that was before the Ninth Circuit below. The circuits, however, resolved the matter differently. The Ninth Circuit concluded that the matter could be resolved as a question of law. The Fourth Circuit resolved the matter as a factual issue after a hearing, *Tavenner*, *supra*, at pages 405-406. Here, again, as in *Sholdan*, the peculiarities of any state law were not germane. Rather, the Fourth Circuit concluded, first, that " . . . transfers of exemptible property *are* amenable to avoidance and recovery actions by bankruptcy trustees . . . " [emphasis in original], *Tavenner*, *supra*, page 406, and then went on to conclude that " . . . the evidence amply supports the bankruptcy court's finding that Smoot transferred the FELA proceeds to Glass Apple with the intent to hinder, delay, or defraud his creditors." *Tavenner*, *supra*, at page 408. The Bankruptcy Court also found that the transfer was constructively fraudulent, *Tavenner*, *supra*, at page 408, and was affirmed as well. Here, again, the contrast with Stern is stark. It is the difference between determination of an issue as a matter of law and only after a full evidentiary hearing.

Nothing in either *Sholdan* or *Tavenner* deals with the peculiarities of specific state exemption laws. This case does boil down to a conflict among the circuits in the approach to the intersection of fraudulent transfer law and exemption planning. Deprived of the cover that all that exists here is a divergence of interpretation of differing state exemption laws, Stern does not argue, nor can he argue, that the issue of when exemption planning becomes fraudulent transfer, which has bedeviled the courts, trustees, and counsel, is not of national importance.

CONCLUSION

For all the reasons set forth herein and in the Petition for Writ of Certiorari, it is respectfully requested that the Petition be granted.

Respectfully submitted,

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